generally applicable rules in place that specify the cost support that must be submitted with any new service tariff, including a video dialtone tariff. Pursuant to these rules, carriers must submit engineering studies, time and wage studies, or other cost accounting studies to identify the direct costs of video dialtone. LECs have proposed a number of different network architectures for video dialtone, and there are wide variations in the manner in which, and the degree to which, LECs are proposing to integrate their video dialtone systems with their telephone networks. This diversity and experimentation, which we view as beneficial to the development of a modern telecommunications infrastructure, precludes us from adopting a one-size-fits-all rule for the identification of video dialtone direct costs. The tariff review process, which includes the possibility of tariff investigations under Section 204(a), will allow close examination of each LEC proposal and enable us to require such cost information as may be necessary to evaluate each proposal.[402] If the application of our existing rules has unintended consequences, or if the process reveals systematic problems, we will revisit our determination to rely on existing procedures.

215. We conclude, however, that it is important that we provide more specific guidance regarding the identification of direct costs in video dialtone tariffs than is ordinarily given. Local exchange carriers may, over time, make large investments to upgrade their networks for video dialtone and other broadband services. The large amounts of investment involved, and the serious concerns about cross-subsidization expressed in the record of the instant proceeding, suggest that video dialtone rates will be subject to intense scrutiny. We conclude that the video dialtone tariff review process will proceed more smoothly, and LECs and interested parties will be able to participate more constructively, if they better understand our expectations in advance of tariff filings.

216. Because video dialtone is an essential component of a multichannel video service that will compete directly with cable television operators and other multichannel video programming providers, LECs may have an incentive to understate the direct costs of the service in order to set unreasonably low prices and engage in cross-subsidization.[403] Therefore, as explained below, we

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402 We do not intend, as suggested by FCTA, to subject all video transport service offerings to rules set forth in this decision. Such action is beyond the scope of this proceeding.

403 See, e.g., Designing Safeguards Against Cross-Subsidization in Video Dialtone Services by Leland L. Johnson, ex parte submission dated October 3, 1994, on behalf of Adelphia Communications Corporation, et al.

will require the LECs to submit with their video dialtone tariffs a more detailed and complete identification of direct costs than we have generally required in other new services filings.[404]

217. Under our established practice, direct costs include the costs and cost components associated with the primary plant investment that is used to provide the service.[405] In the case of video dialtone, some of these plant costs will be incremental costs associated with plant dedicated to video dialtone service. The direct costs of video dialtone will also include any incremental costs that are associated with shared plant used to provide video dialtone and other services, that is, costs of shared plant that are caused by the carrier's decision to offer video dialtone service. In reviewing video dialtone tariffs, we will scrutinize the basis on which those costs are identified and included in the proposed charges for video dialtone service. We recognize and accept the challenges inherent in determining which costs are truly the consequences of a carrier's decision to provide video dialtone service, i.e., are incremental costs.

218. Moreover, we expect LECs to include in direct costs a reasonable allocation of other costs that are associated with shared plant used to provide video dialtone and other services. We will scrutinize the basis on which those costs are identified and included in the proposed charges. A LEC allocating an extremely low proportion of these other costs of shared plant to video dialtone will be expected to provide a strong justification for that approach, and we do not anticipate accepting a 0% allocation of the common costs of shared plant as reasonable.

219. Ordinarily carriers decide, in the first instance, whether to include in their direct cost studies any categories of costs (investment and expenses) in addition to primary plant. For video dialtone, however, we direct carriers to treat costs in other accounts as direct costs if those costs are reasonably identifiable as incremental costs of video dialtone service.

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404 We do not rule out the possibility that video dialtone tariffs would propose unreasonably high rates. The complete identification of direct costs that we require herein, combined with the existing requirement that LECs justify their overhead loadings, will allow us to determine the price ceiling.

405 Primary plant investment is investment recorded in central office equipment, information origination/termination equipment, and cable and wire facilities accounts. The cost components associated with these primary plant accounts include gross investments, depreciation reserves and expenses, various taxes and deferred taxes, return on investment, and plant-specific operations expenses. See generally Part 32 of the Commission's Rules.

Examples of accounts that might include reasonably identifiable incremental costs of video dialtone are those to which carriers book costs associated with land, buildings, network administration, testing, engineering, plant operations administration, product management, sales, advertising, customer services, and legal.

220. For purposes of the new services test, all costs not treated as direct costs are classified as overheads. Carriers bear the burden of justifying why their overhead loadings do not produce a final rate that is unreasonably high. As with shared plant, we will also require a strong justification for allocation of extremely low overheads to video dialtone service, and would not anticipate accepting a 0% allocation of overhead as reasonable. At the same time, we emphasize that we are not seeking to saddle video dialtone with an unreasonable proportion of overheads and other common costs. We hope and expect that video dialtone will be a successful service in the marketplace, and therefore contribute to the recovery of common costs. We recognize that imposing excessive cost burdens on video dialtone could diminish demand and possibly overall revenues and thereby thwart these objectives. Accordingly, the effects of price changes on video dialtone demand should be given due consideration in determining what constitutes a reasonable allocation of common costs and overheads. In this regard, we will scrutinize the basis for claims and projections of demand elasticities submitted in support of proposed video dialtone rates. And, of course, our rules will provide interested parties ample opportunity to comment on these claims and projections.

221. In implementing this specific guidance, we direct the Chief, Common Carrier Bureau, to ensure that video dialtone carriers file all the information necessary for purposes of evaluating the costs of providing video dialtone service and the reasonableness of the proposed cost allocations and overhead loadings. We further direct the Chief, Common Carrier Bureau, to consider whether the Bureau should adopt specific minimum requirements, including the possible use of standardized formats, for the supporting documentation that video dialtone providers must furnish with their proposed tariffs. We note that the Bureau previously has adopted such requirements in connection with the LECs' annual access tariff filings, as well as tariffs filed to provide specific services, such as Open Network Architecture (ONA) and Expanded Interconnection services. The goal of any such requirements would be to make the review of video dialtone tariffs by the Bureau and interested members of the public more expeditious and less costly.[406] In addition to making the tariff review process

406 We do not intend that any such requirements should delay our consideration of video dialtone tariffs. LECs with Section 214 authorizations for video dialtone systems need not delay filing their proposed tariffs.

more accessible to interested parties, the establishment of minimum standard format and information requirements would facilitate their ability to participate in a meaningful way.

222. We agree with the Joint Petition that video dialtone service does not fit into existing price caps baskets given its unique characteristic of transmitting the video services of multiple program providers to end users on a common carrier basis.[407] We tentatively conclude that a separate price cap basket for video dialtone would help prevent improper cross-subsidization by preventing local telephone companies from offsetting a price reduction for video dialtone service with an increase in rates for other regulated interstate services. However, it is not necessary to establish this basket now, on an interim basis. Because no tariffs for permanent video dialtone service have yet been filed, it is unlikely that any such tariff will go into effect prior to January 1, 1995. July 1, 1996 is thus the earliest date on which a video dialtone service could be included in a price cap index. We therefore will seek comment on establishing a separate price cap basket for video dialtone service in a supplemental notice in the LEC Price Cap Performance Review.[408]

223. At this time we will not address the merits of whether basket-by-basket earnings calculation should be required. We recognize that investment in video dialtone facilities may generate costs that will have an impact on sharing. Issues regarding sharing, however, are being examined in the LEC Price Cap Performance Review. In the near term, we will continue to determine sharing and lower end adjustments on an overall interstate basis.[409]

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407 Bell Atlantic's argument that video dialtone should be placed in the special access basket has been rendered moot by the recent restructuring of LEC price cap baskets. See Transport Rate Structure and Pricing, Second Report and Order, 9 FCC Rcd 615 (1994).

408 See Price Cap Performance Review, supra note 312. That Review has sought comment more broadly on what changes we should make to price cap regulation as competition to LEC services develops. In particular, the Commission has invited parties to suggest proposals that could form the basis for the development of a plan for revising the baseline price cap model to facilitate the transition to more streamlined regulation for specific services that are subject to increased competition.

409 We also deny requests to establish a pure price cap system for video dialtone at this time. This issue will be addressed along with other proposed changes to the LEC price cap plan in the Price Cap Performance Review.

3. Two-Level Regulatory Framework and Application of Other Enhanced Service Safeguards

Background

224. In the Second Report and Order, the Commission concluded that a two-level regulatory framework for LEC provision of video dialtone services would best serve the public interest. Under this framework, the first-level platform consists of basic, regulated video delivery services, which must be provided on a nondiscriminatory, common carrier basis. The second-level of services consists of enrichments to the basic service, including enhanced and other nonregulated services. The Commission held that existing safeguards should apply to LEC provision of enhanced and other nonregulated services on the second level. These safeguards include accounting and cost allocation rules to separate enhanced and other nonregulated service costs from regulated service costs, as well as network disclosure rules to ensure that telephone equipment manufacturers and vendors have adequate notice of changes that could affect the compatibility of their equipment.[410] In addition, the Commission held that the BOCs must adhere to ONA requirements and other safeguards adopted in the BOC Safeguards Order, including rules governing the use of CPNI.[411] In addition to CPNI requirements discussed in the next section of this Order, these other safeguards include: (1) nondiscrimination reporting requirements to ensure that BOCs and GTE do not discriminate in the quality, installation, and maintenance, of basic services provided to certain enhanced service providers; and (2) network disclosure rules, which ensure that BOCs and GTE do not favor certain enhanced service providers by allowing them unique access to information about network changes that could affect their interconnection of

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410 The network disclosure requirements of the "all carrier rule" apply to all LECs. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Memorandum Opinion and Order, 84 FCC 2d 50, 82, para. 95 (1980); Computer & Business Equip. Mfrs. Ass'n, Report and Order, 93 FCC 2d 1226, 1229, para. 7 (1983); see also 47 C.F.R. § 68.110(1993).

411 7 FCC Rcd at 5823-24, para. 93. GTE is now also required to comply with the Commission's ONA rules. Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket 92-256, FCC 94-58, 59 Fed. Reg. 26756 (released May 24, 1994) (GTE/ONA Order).

enhanced services to the network.[412] The Commission stated that it would consider imposing additional safeguards, tailored to specific video dialtone proposals, in the Section 214 certification process, if necessary. It also stated that, as part of its overall review of its video dialtone rules and policies, originally scheduled for 1995, it would review its video dialtone safeguards in order to assess their continuing effectiveness in light of the evolution of video dialtone technology and services.[413]

Pleadings

225. SWBT seeks reconsideration of the decision to establish a two-level regulatory structure for video dialtone services and to apply enhanced services safeguards to LEC provision of second-tier services.[414] SWBT argues that, because video dialtone is "not much more than a concept whose architecture is still on the drawing board[,]" it is premature for the Commission to dictate a two-tier or any other type of regulatory structure for video dialtone. It argues that cable companies are not subject to a similar construct, and that it is therefore unfair to impose it on video dialtone systems.

226. SWBT argues, further, that the Commission should not have imposed enhanced services safeguards on LEC provision of video dialtone services. It argues that, unlike the enhanced services market, "the video entertainment market is populated by entrenched providers who already have virtually unlimited access to most U.S. homes."[415] In contrast, it claims, LECs lack even a toehold in this market.

227. Compuserve, Prodigy, and IIA oppose SWBT's requests for reconsideration of the two-level structure. Compuserve argues that a strict division between level one and level two services is necessary to protect nonregulated enhanced service providers from common carrier regulation.[416] Prodigy asserts that if the Commission eliminated the dichotomy between basic and enhanced services, LECs would be able to deny competing enhanced service providers access

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412 See BOC Safeguards Order, 6 FCC Rcd at 7601-5, paras. 65-74. These network disclosure obligations are in addition to the obligations imposed by the "all-carrier" rule.

413 7 FCC Rcd at 5023-24, para. 96.

414 SWBT Petition at 12-13.

415 Id.

416 Compuserve Comments at 8.

to basic video dialtone services or stifle competition by bundling enhanced service offerings with basic offerings.[417]

228. Several parties also oppose SWBT's request that BOCs be relieved from the obligation to adhere to the nonstructural safeguards established in the BOC Safeguards Order.[418] Prodigy argues that SWBT's claim that LECs lack market power in the video marketplace is irrelevant given the LECs' monopoly power in the adjacent local exchange market and the inevitable overlap of video and other information services. Compuserve notes that video dialtone includes not only video programming, but videotext and other information services that are already subject to ONA requirements.

229. Some parties argue that existing nonstructural safeguards do not provide enough protection. For example, CFA/CME assert that given LEC incentives for cross-subsidization and discrimination, their history of abuse in these areas, and the inadequacy of Commission resources to police LEC abuses, the Commission should adopt more stringent safeguards, including, at a minimum, separate subsidiary requirements for all LEC nonregulated activities.[419]

Discussion

230. We now affirm our decision in the Second Report and Order to adopt a two-level regulatory framework for video dialtone services and to require BOCs and GTE to comply with our existing enhanced services safeguards. In adopting a two-level regulatory framework, we noted that this dichotomy tracks our existing regulatory framework for LEC basic and enhanced services.[420] We do not think the public interest would be well-served by adopting a different set of rules for video dialtone services, particularly given that LECs will provide both video and non-video offerings through these systems. Moreover, the two-level framework should promote competition and broaden consumer choice. The level-one common carrier platform will enable multiple video service providers, for the first time, to obtain access on a nondiscriminatory basis to the basic network functions that will allow such service providers to distribute their services to

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417 Prodigy Comments at 1-2.

418 See, e.g., Compuserve Comments at 5-6; Prodigy Comments at 2-3; IIA Comments at 3; NCTA Reply Comments at 6 n.15.

419 CFA/CME Petition at 24-32. See also, Prodigy Comments at 2; Compuserve Comments at 6-7.

420 7 FCC Rcd at 5811, para. 58.

consumers. Requiring LECs to offer nonregulated services subject to existing safeguards for the provision of such services will help ensure that LECs are not able to compete unfairly with other enhanced service providers and that LECs cannot bundle enhanced and nonregulated services with basic services in order to impede competition. SWBT has offered no basis for us to alter these conclusions. Even though video dialtone is still evolving, that should not preclude us from establishing a basic regulatory framework to govern it. In fact, application of the current regulatory framework until the evolution of video dialtone clearly requires a different framework is the most straightforward course of action under these circumstances. The fact that cable operators are subject to a different regulatory structure does not convince us otherwise, especially given that cable operators are governed by a different statutory regime than LECs.

231. We also affirm the Commission's decision to apply existing enhanced service safeguards to BOC and GTE provision of nonregulated level-two video dialtone services. No party offers any new evidence or argument that would persuade us that this decision should be revised. The fact that video dialtone is a new service does not lessen the possibility of discrimination, particularly since the BOCs and GTE may well use their video dialtone systems for video and non-video services and in light of their continuing market power in non-video services. Thus, absent the safeguards we have prescribed, we believe that there is an unacceptable risk that the BOCs and GTE could use their control over underlying video transmission facilities to obtain advantages in the provision of video-related enhanced and nonregulated services.

232. We also reject arguments that we should adopt more stringent requirements at this time, such as requiring LECs to offer all level-two services through a separate subsidiary. Here again, commenters have raised no new issues or arguments. We have found that separate subsidiary requirements for enhanced services impose inefficiencies and other costs, and that discrimination and cross-subsidization can be policed adequately through less onerous means.[421] No party has shown that provision of video-related enhanced services, which at this time do not include video programming itself, is so fundamentally different from provision of other enhanced services as to require a different regulatory regime. We do, however, make one minor change to our nonstructural safeguards. Currently, the BOCs and GTE must file nondiscrimination reports on their installation and maintenance of

421 See BOC Safeguards Order, 6 FCC Rcd at 7575-76, paras. 8-9.

49 categories of basic services.[422] To adapt this requirement to video dialtone, we require the BOCs and GTE to add an additional service category for video dialtone delivery service.[423] We note that the United States Court of Appeals for the Ninth Circuit recently vacated in part and remanded the BOC Safeguards Order, on the ground that the Commission had not adequately explained how, without full unbundling of BOC networks under ONA, discrimination could be prevented in the absence of structural safeguards.[424] We delegate to the Common Carrier Bureau authority to establish interim measures to govern BOC provision of enhanced services, including video dialtone-related enhanced services, if and when this decision becomes effective.

233. Finally, in the Second Report and Order, we stated that we would review our video dialtone rules and policies in 1995. Such review no longer appears to be necessary in light of the detailed examination we have undertaken in this Order of those rules and policies, as well as our continuing work on major video dialtone issues through the CPNI data request[425] and the Third Further Notice.[426] Indeed, we are concerned that the regulatory uncertainty that could stem from another comprehensive review of video dialtone rules and policies could discourage video dialtone deployment pending that review. For these reasons, we will not initiate a formal review of our video dialtone rules and policies in 1995. Nevertheless, we will continue to monitor the evolution of video dialtone and oversee its implementation in specific

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422 Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 3084, 3096, Appendix B (1990) (BOC ONA Reconsideration Order), 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), Erratum, 5 FCC Rcd 4045, pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 7646 (1991), 8 FCC Rcd 2606 (1993) (BOC ONA Second Further Amendment Order), pet. for review denied MCI Telecommunications Corp. v. FCC, 4 F.3d 1505 (9th Cir. Sept. 23, 1993). GTE must also comply with these reporting requirements, subsequent to filing an ONA plan. See GTE/ONA Order, supra note 411.

423 See BOC ONA Reconsideration Order, 5 FCC Rcd at 3096 Appendix B.

424 California v. FCC, Nos. 92-70083, 92-70186, 92-70217, and 92-70261, slip op. at 12767-8, 12775 (9th Cir. October 18, 1994).

425 See infra paras. 243-44.

426 See Third Further Notice, infra paras. 268-285. The Commission is also addressing issues of electronic redlining raised by two petitions filed on May 23, 1994. See supra note 22.

applications through the Section 214 process and the tariff review process. In addition, if in the future it becomes apparent that we should modify aspects of our video dialtone rules and policies, we will initiate a proceeding to do so.

4. Joint Marketing and Customer Proprietary Network Information

Background

234. As noted, in the Second Report and Order, the Commission concluded that existing nonstructural safeguards, adopted in the BOC Safeguards Order should apply to the provision of video dialtone by the BOCs. In so concluding, the Commission reaffirmed its holding in the BOC Safeguards Order that significant public interest benefits accrue from the efficiencies and innovations that can be obtained by permitting some integration of basic and enhanced services, including the integrated or joint marketing of these services by a LEC.[427]

235. Included among the Commission's existing nonstructural safeguards are CPNI requirements.[428] Under these requirements, the BOCs and GTE must limit access of their enhanced services marketing personnel to CPNI if a customer requests,[429] except that for customers with more than twenty access lines, the BOCs and GTE must obtain prior customer authorization before gaining access to CPNI.[430]

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427 Second Report and Order, 7 FCC Rcd at 5827, para. 89; BOC Safeguards Order, 6 FCC Rcd at 7617-21, paras. 100-104.

428 CPNI is "all information about customers' network services and customers' use of those services that a BOC possesses by virtue of its provision of network services." CPNI includes billing information, usage data, calling patterns, traffic studies, and forwarded-to-numbers, but does not include credit information. Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 4 FCC Rcd 1, 215 (1988), recon., BOC ONA Reconsideration Order, supra note 422.

429 BOC Safeguards Order, 6 FCC Rcd at 7605, para. 75.

430 Id. at 7612. The Commission found that BOCs would be effectively precluded from joint marketing to small customers if prior authorization of CPNI use was required for such customers, thus depriving the customers of "one-stop shopping" opportunity. It also found that a customer with more than 20 lines is more likely to be aware of enhanced services options, even absent BOC joint marketing. Finally, the Commission stated that large customer CPNI is more valuable to competing enhanced service providers than small customer CPNI in the telephone context. Id.

In addition, the BOCs and GTE must make CPNI available to enhanced service providers (ESPs) designated by a customer, and must notify multiline customers of the option to so designate an ESP.[431] They must also make available to ESPs nonproprietary, aggregated CPNI on the same terms and conditions on which they make such CPNI available to their own enhanced services personnel, and must notify ESPs of the availability of such information.[432]

Pleadings

236. PaPUC and the Joint Petitioners urge us to adopt limits on the joint marketing of basic telephony and video dialtone service, and on the use of CPNI that a LEC may obtain as a video dialtone provider.[433] They argue that the Commission incorrectly concluded that existing CPNI and joint marketing requirements for LEC-provided CPE and enhanced services adequately address competitive and privacy concerns in the video dialtone context, and that joint marketing of video dialtone and telephone service by a LEC customer service representative would enable the telephone company to obtain an unfair advantage over competing providers of video facilities or services.[434] The Joint Petitioners add that the LEC advantage would be particularly pronounced in dealing with new residents who typically seek telephone service immediately.[435] They note that in the context of CPE the Commission has previously required BOCs who engage in joint marketing to inform customers of the availability of alternative sources of equipment.[436] PaPUC argues that the existing CPNI rules will not ameliorate the LEC advantage derived from joint marketing of telephone and video dialtone service because the existing rules require BOC personnel to obtain prior approval before using CPNI only for customers with more than twenty access lines, and video dialtone customers will generally be single line customers.[437] The Joint Petitioners further contend that application of existing CPNI rules to video dialtone

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at 7610-12.

431 Id. at 7605.

432 Id.

433 PaPUC Petition at 9-10; Joint Petition at 20.

434 PaPUC Petition at 9-10; Joint Petition at 20-21.

435 Id. at 21.

436 Id.

437 PaPUC Petition at 2, 9-10. See also Compuserve Jt. Pet. Comments at 5-6.

would not provide video dialtone customers with sufficient privacy.[438] In particular, they argue, LECs "should not be permitted to gather television viewing patterns and market the information on individual subscribers to customer-programmers."[439]

237. Two parties support the Joint Petition view regarding joint marketing and CPNI.[440] Compuserve urges the Commission to revise the CPNI rules to require all providers of enhanced services, including video dialtone services, to obtain prior written consent of basic telephone customers before using customers' CPNI.[441] It argues that this requirement would ensure competitive equity and customer privacy.[442] World Institute states that it has no objection to the Commission conditioning particular Section 214 applications on certain privacy requirements.[443]

238. Several LECs oppose the Joint Petition, stating that existing joint marketing and customer privacy rules are sufficient to protect consumers if LECs also offer video dialtone service.[444] They maintain that the Commission has already decided not to treat enhanced video services differently from other enhanced services for purposes of joint marketing and CPNI, and that the Joint Petition offers insufficient basis for different treatment.[445] Bell Atlantic agrees with the Commission's finding in the Second Report and Order that joint marketing of basic and enhanced services can provide public interest benefits through greater efficiencies and innovations.[446] NYNEX contends that CPNI rules protect customers' right to privacy, including residence and small business

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438 Joint Petition at 22.

439 Id.

440 See Indiana/Michigan Jt. Pet. Comments at 2-3; Compuserve Jt. Pet. Reply Comments at 5-6.

441 Compuserve Jt. Pet. Reply Comments at 5-6.

442 Id.

443 World Institute Jt. Pet. Comments at 7 (citing 47 U.S.C. § 551).

444 See, e.g., SNET Jt. Pet. Comments at 13; Ameritech Jt. Pet. Comments at 11-12; NYNEX Jt. Pet. Comments at 16-17; Bell Atlantic Jt. Pet. Comments at 9-10.

445 Ameritech Jt. Pet. Comments at 11-12; BellSouth Jt. Pet. Comments at 7-8. See also PacTel Jt. Pet. Comments at 4.

446 Bell Atlantic Jt. Pet. Comments at 9-10.

subscribers, because LECs do not release CPNI to non-affiliated vendors without customer authorization.[447] SNET notes that a video dialtone platform must be offered on a nondiscriminatory basis and therefore has no particular advantage over other video facilities or services.[448] NYNEX argues that the advantage in joint marketing belongs not to the local telephone companies, but to the cable companies with an entrenched customer base and monopoly power in video services.[449]

Discussion

239. We affirm our decision to permit LECs to engage in joint marketing of basic and enhanced video dialtone services, as well as of basic video and nonvideo services.[450] We also affirm our decision to apply existing CPNI rules to video dialtone at this time. Nevertheless, we direct the BOCs and GTE, the carriers to which our CPNI rules currently apply, to provide us with additional information about the kinds of CPNI to which they will have access as a result of providing video dialtone service so that we may obtain a better record in assessing whether existing CPNI rules best balance the various interests that are implicated by the use of CPNI in the video dialtone context.

240. We permit LECs to engage in joint marketing of basic and enhanced video services, and of basic video and nonvideo services, because we believe that the benefits of permitting joint marketing outweigh any adverse effect on competition. We have discussed these benefits at length in the context of nonvideo services.[451] We have noted, for example, that joint marketing allows LECs to provide basic and enhanced services more efficiently and to combine basic and enhanced services to provide customers with one-stop shopping for services tailored to their individual needs.[452] We have also noted that permitting LECs to engage in joint marketing of basic and enhanced telephone services can help to increase customers' knowledge about such services, thereby expanding the

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447 NYNEX Jt. Pet. Comments at 17.

448 SNET Jt. Pet. Comments at 13.

449 NYNEX Jt. Pet. Comments at 16-17.

450 Thus, for example, LEC personnel may market video dialtone service and telephony services at the same time. Likewise, they may jointly market basic video dialtone transmission service and a video gateway or other enhanced service.

451 BOC Safeguards Order, 6 FCC Rcd at 7609-10, para. 85.

452 Id.

market for such services, to the benefit not only of LEC enhanced services providers, but other providers as well.

241. These same benefits apply in the video dialtone context. Joint marketing can offer consumers the convenience of one-stop shopping both for basic telephone and video dialtone services and for basic and enhanced video dialtone services. Through joint marketing, LECs will be able to increase customer awareness not only of the video dialtone system generally, but of enhanced features and functions available on that system. This awareness will benefit programmer-customers as well as end users and result in greater usage of the video dialtone platform. At the same time, LECs will be able to market video dialtone services in the most efficient manner possible, avoiding the costs imposed by structural separation.

242. The record in this proceeding does not support a finding that joint marketing of video and telephony services will have an anticompetitive impact on the provision of video programming services to end users. While consumers moving to a new residence typically arrange for telephone service prior to or immediately after the move, they also will be arranging for other services at that time, including video programming services. No one has shown that the first call placed is necessarily to the telephone company. More significantly, the cable operator, not the telephone company, will be the incumbent video programming provider in the market. We believe that consumers today are likely to be aware that they may order video programming services from the local cable operator. We also believe that they will do so if the cable operator's rates and programming are preferable to those offered by programmers on the video dialtone network. Simply because telephone companies may sometimes have an initial contact with consumers changing residences in our view does not demonstrate a likely anticompetitive effect or warrant a prohibition on joint marketing. We also note that the extent to which LECs will market basic video dialtone service to end users is unclear, particularly since in some video dialtone applications, LECs have proposed to charge their programmer-customers, but not end users, for basic video dialtone service.[453] Moreover, since telephone companies, as common carriers, are prohibited from favoring a particular video programmer's product, the ability of LECs to market video dialtone services to consumers will be constrained in any event. By contrast, cable companies with authorization to provide telephone

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453 See, e.g., New Jersey Bell, File No. W-P-C 6838, Rochester Telephone, File No. W-P-C 6867, and Pacific Bell File No. W-P-C 6913.

service can jointly market video and telephony services without restrictions on favoring particular video programmers.[454]

243. We also apply to video dialtone, at this time, our existing CPNI rules, which were recently upheld by the United States Court of Appeals for the Ninth Circuit.[455] We do not now establish special CPNI rules for video dialtone because the record provides an inadequate factual basis for doing so. Specifically, no party has provided evidence that existing CPNI rules do not properly balance our CPNI goals relating to privacy, efficiency, and competitive equity in the video dialtone context.[456] Nevertheless, because of the significant privacy issues that are potentially implicated by video dialtone-related CPNI, we believe we should obtain additional information about such CPNI so that we may carefully assess whether existing CPNI rules sufficiently protect customer privacy in the video dialtone context.[457] For example, we seek information as to whether LECs, in providing video dialtone, will have access to information about the types of

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454 We are aware that many cable companies are still prohibited by state laws or regulations from providing telephone service. As noted, we strongly support removal of these restrictions. See also supra note 66.

455 California v. FCC, Nos. 92-70083, 92-70186, 92-70217, and 92-70261, slip op. at 12770, 12775 (9th Cir. October 18, 1994).

456 CPNI/joint marketing rules reflect a balance between competing policy goals of: (a) protecting customers' privacy interests against disclosure of their CPNI by BOC or GTE personnel; (b) increasing customer access to enhanced services by permitting BOC and GTE personnel to market telephone service and enhanced services at the same time, and to use CPNI to assist in identifying customer interests and needs; and (c) preventing BOC or GTE-affiliated ESPs from gaining a competitive advantage over independent ESPs by virtue of having information they can use to market enhanced services to the customer.

457 We note that we are currently reviewing our existing CPNI rules for enhanced services in another proceeding. Specifically, on March 10, 1994, we issued a public notice seeking comment on whether existing CPNI rules remain appropriate in light of recent alliances, mergers and acquisitions between LECs and non-telephone company entities. In that notice, we asked inter alia, whether our CPNI rules should apply to all LECs. Additional Comment Sought on Rules Governing Telephone Companies' Use of Customer Proprietary Network Information, 9 FCC Rcd 1685 (1994). Arguments, such as Compuserve's, that we should tighten our CPNI rules for all enhanced services are properly raised in the context of that proceeding.

programming that each customer views. This information would raise greater privacy concerns than other CPNI, which does not generally include information about the content of customer communications. We are also interested in assessing the competitive value of CPNI obtained from video dialtone, as well as the extent to which access to this information promotes the efficient provision of regulated and nonregulated services by LECs.

244. In order to obtain a better record for addressing these issues, we direct each of the BOCs and GTE to file, within ninety days of publication of a summary of this Order in the Federal Register, a detailed description of the types of CPNI to which it anticipates having access as a provider of video dialtone service. We also direct each to explain how it would plan to use such information in marketing video dialtone services to video programmers or consumers. Other interested parties, including, but not limited to, independent LECs, may also file at that time any information responsive to these issues. After this information is filed, we will issue a public notice establishing a supplemental pleading cycle that will give all interested parties the opportunity to comment. Based on this record, we will then reassess whether the public interest would be served by modifying existing CPNI rules for video dialtone service and propose any changes in those rules that may be warranted.

C. OTHER ISSUES

1. Preferential Access to Video Dialtone

Background

245. In the Second Report and Order, the Commission declined to require LECs to set aside capacity at reduced or no charge for certain classes of video programmers or to impose upon LECs federal public, educational and governmental (PEG) access requirements.[458] The Commission concluded that "[u]nlike other video distribution regulatory schemes, the bedrock common carrier nature of video dialtone . . . will require unfettered access for all program providers, regardless of their nature and, in this way, will directly promote the goals access rules have historically been designed to meet."[459] The Commission determined that if the marketplace does not meet the needs of certain groups, such as public television broadcasters, it would be preferable to address

458 Second Report and Order, 7 FCC Rcd at 5805, para. 44.

459 Id.

those needs directly through specific governmental appropriations.[460]

Pleadings

246. Several petitioners seek reconsideration of the Commission's decision not to prescribe preferential access for noncommercial and other nonprofit programmers.[461] They argue that this decision is contrary to Congressional mandates and longstanding Commission policy and will likely deny the American public meaningful access to noncommercial and other nonprofit programming on the video dialtone network.[462]

247. APTS/CPB and CFA/CME assert that, beginning with the enactment of the Public Broadcasting Act of 1967, Congress has indicated its intent that nonprofit telecommunications services be made available to the widest possible audience, regardless of the technology employed to transmit that programming. Even after the Commission's decision in this proceeding, they claim, Congress reiterated this mandate -- in both the Public Telecommunications Act of 1992 and the 1992 Cable Act.[463] They argue, further, that the

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460 Id. at 5805, para. 44 n.103.

461 See CFA/CME Petition at 33-36; APTS/CPB Petition at 1-22. See also CLG Opposition at 10-11. In addition, INTV seeks preferential rates for broadcast licensees and NAB seeks preferential rates for video dialtone services that are primarily local in nature. See infra paras. 251-2.

462 CFA/CME Petition at 33-35 and APTS/CPB Petition at 4-17. See also CLG Opposition at 10-11; The National Trust for the Development of African-American Men ex parte letter, June 15, 1994; and People for the American Way ex parte letter, June 20, 1994.

463 See APTS/CPB Petition at 4-10; CFA/CME Petition at 33-36. They cite, in particular, the "must carry" provisions of the 1992 Cable Act and provisions requiring reservation of capacity and preferential rates for public telecommunications services on direct broadcast satellite technology. In addition, they cite the Public Telecommunications Act of 1992, which added Section 396(a)(9) to the Communications Act, providing: "it is in the public interest for the Federal government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies . . ." APTS/CPB Petition at 4. APTS/CPB also quotes at length the legislative history of that Act in support of its claim that Congress intended that support of public telecommunications programming be provided over new technologies. Id. at 5.

Commission also has recognized the importance of ensuring universal access to such programming and the need to take special measures to do so.[464] According to APTS/CPB, the Commission provided neither a reasoned basis nor record support for this departure from longstanding policy, and the Commission's decision is therefore arbitrary and capricious.[465]

248. APTS/CPB and CFA/CME also dispute the Commission's assertion that preferential treatment for certain classes of program providers is inconsistent with the common carrier nature of video dialtone. Citing the Commission's Lifeline and Linkup America programs, they assert that the Commission has already implemented special preferences for certain groups in the context of a common carrier model.[466] They argue that preferential treatment is not unlawful or inconsistent with common carrier regulation unless that treatment is unjust and unreasonable.[467] They claim that preferential treatment of noncommercial programming would be fully justified, as Congress and the Commission have repeatedly recognized that the marketplace will not support the production or distribution of this programming and that governmental action is necessary to ensure its availability.

249. According to APTS/CPB, if public broadcasters are required to pay marketplace rates for video dialtone, they either will be unable to participate in video dialtone, or they will be limited to providing programming that will generate sufficient revenues to cover costs.[468] In either case, it claims, public television would be unable to fulfill its mission of providing high quality educational programming and a voice for underserved pockets of the American public.[469]

250. CFA/CME criticizes the Commission for relegating to Congress or state legislatures the question of financial aid to programmers.[470] It argues that because of the enormous editorial power that attends government funding, a reliance on government

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464 See APTS/CPB Petition at 10-12; CFA/CME Comments at 19-20.

465 APTS/CPB Petition at 17-22.

466 See APTS/CPB Petition at 23; CFA/CME Petition at 33-34.

467 Id. See also INTV Petition at 5, discussed infra at para. 246 (making the same argument in the context of broadcast television).

468 APTS/CPB Petition at 15.

469 Id.

470 CFA/CME Petition at 33.

appropriations could actually impede the Commission's goal of true diversity. It argues that, the likely result of the Commission's decision is to restrict consumer choice to commercial programmers and, possibly, a handful of governmentally selected noncommercial programmers.[471] CLG likewise asserts that the Commission's decision is inconsistent with the goal of fostering diverse programming.[472]

251. NAB asks us to establish reduced access rates for services that are primarily local in nature. NAB argues that such a policy would make the most-needed services more affordable to more consumers. In addition, it argues, because these services are the most popular, reduced rates could stimulate use of video dialtone, resulting in faster deployment of the service.[473]

252. Association of Independent Television Stations, Inc. (INTV) maintains that the Commission's decision threatens the future of free, over-the-air broadcast television.[474] Citing data in an FCC staff report, it notes that advertising revenues for broadcast stations have fallen by about four percent per year in real terms since 1987. It argues that, unless the Commission alleviates the cost burden faced by broadcast programmers, such programmers may be unable to continue providing free over-the-air television, or they may be forced to reduce news and other non-entertainment programming.[475]

253. NCTA and US West oppose the petitions for reconsideration.[476] They argue that preferential rates for certain classes of programmers would be inconsistent with the Commission's determination that video dialtone must be offered on a common carrier basis.[477] NCTA argues further that allowing or requiring LECs to offer different terms and conditions to particular programmers would be inconsistent with the cable-telco cross-ownership ban. It states that such a policy would accord LECs precisely the kind of editorial discretion and control over

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471 Id. at 35. See also CFA/CME Comments at 19.

472 CLG Comments at 10-11.

473 NAB Petition at 3; 12-13 and NAB Comments at 18-19.

474 INTV Petition at 3-7.

475 Id. at 4-7.

476 NCTA Petition at 5; NCTA Comments at 10-11; US West Comments at 5.

477 US West Comments at 5; NCTA Petition at 5-7; NCTA Comments at 10-11; NCTA Reply Comments at 6-7.

packaging that is at the heart of cable service.[478] On the other hand, Bell Atlantic argues that the Commission should clarify that LECs are allowed to establish different rates as they choose, but are not required to follow pre-determined rate restrictions.[479]

Discussion

254. In the Second Report and Order, we decided not to mandate preferential treatment for certain classes of video programmers largely because we concluded that mandatory preferential treatment is generally inconsistent with a Title II common carrier regime, the cornerstone of which is the provision of service to the public on the basis of rates, terms, and conditions that are not unreasonably discriminatory. We still have concerns about this issue. A system of discounts or free access for certain video programmers could also introduce economic distortions that would restrict demand for video dialtone service.[480] For these and other legal and policy reasons, mandating preferential rates for any specific class of programmer may not be compatible with the public interest. On the other hand, however, the continued availability of diverse sources of programming clearly serves the public interest.

255. As parties note, we have recognized exceptions to the general principle of nondiscrimination in the provision of common carrier services. These exceptions have been based upon a compelling showing of need and strong public policy concerns.[481] Based on our review of the record, we conclude that we do not currently have a sound basis for determining whether a similar exception should be made here, and if so, for which programmers, and to what extent. In the Third Further Notice, we seek comment on these issues. We also seek comment on whether a proposal by Bell Atlantic that seeks to permit LECs voluntarily to provide

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478 NCTA Reply Comments at 6-7; NCTA Comments at 10-11.

479 Bell Atlantic Comments at 8 n.26.

480 If the Commission required LECs to subsidize video dialtone service for certain video programmers, they would presumably have to raise rates for other programmer-customers. These prices, if sufficiently high, could suppress video dialtone demand, thereby unnecessarily impeding the development of video dialtone systems.

481 Specifically, the LifeLine and Link Up America programs cited by these parties were designed to ensure that low-income Americans can obtain basic telephone service. These programs are thus part of our long-standing commitment to the promotion of universal service.

preferential rates to certain classes of programmers is or could be lawful.

2. Special Incentives

Background

256. In the Second Report and Order, the Commission declined to adopt or propose special incentives to accelerate deployment of the common carrier broadband network. The Commission found that the regulatory changes made in the Second Report and Order offered sufficient incentives to encourage LECs to invest in infrastructure and deploy advanced networks.[482] It stated that, in lieu of special incentives, it was preferable to remove regulatory barriers so that market forces would determine the success of advanced technologies.[483] The Commission also reasoned that special incentives could thwart the development of useful alternative technologies.

Pleadings

257. ACT and SNET contend that the Commission erred in deciding not to provide special incentives to carriers to encourage investment in advanced broadband infrastructure.[484] ACT argues that the Commission mistakenly concluded that market forces alone will encourage telephone company investment for the construction of advanced broadband networks. According to ACT, deployment of advanced infrastructure will be unnecessarily delayed because current depreciation schedules for existing copper plant are too low.[485] ACT asserts that, based on existing depreciation schedules, it could take as much as 40 years for LECs to depreciate fully their existing plant.[486] ACT also states that the Commission erroneously decided to rely on the three year review process for any changes to the price cap regime.[487]

258. ACT disputes the Commission's determination that it would be endorsing one technology over another by giving special

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482 Second Report and Order at 5835, para. 103.

483 Id.

484 ACT Petition at 4; SNET Comments at 2-3.

485 ACT Petition at 5.

486 Id.

487 Id. at ii, 6-7.

incentives to telephone companies that deploy advanced broadband facilities.[488] ACT argues that the Commission is not choosing the technology when it acts on a request for accelerating deployment of facilities.[489] According to ACT, the Commission ignores the "reality of the regulatory process" by maintaining that such would be tantamount to picking technology winners or engaging in industrial policy.[490]

259. On the other hand, NAB argues that video dialtone alone provides sufficient incentives to deploy advanced networks.[491] California Cable Television Association (CCTA) supports the Commission's decision to defer changes to existing depreciation procedures until it can assess the impact of market forces on advanced infrastructure deployment.[492] CCTA adds that any future changes to the depreciation review procedure, including whether any composite rates are appropriate, should only occur after formal notice and comment.[493]

Discussion

260. The petitioners have not presented any persuasive basis for the Commission to modify its decision in the Second Report and Order regarding special incentives. In particular, they have not persuaded us that our existing practices for prescribing depreciation rates pose an impediment to the deployment of new technologies. Under our existing rules, the Commission reviews the depreciation rates of each carrier on a three year rotating cycle. Carriers may also seek interim updates of their depreciation rates. Based on a review of a variety of service life indicators, the Commission establishes depreciation rates for each major category of plant designed to recover the carrier's investment over the plant's projected remaining life. In the case of telephone plant, based on the most recent (1993) depreciation represcription order, the average remaining life is 9 years and approximately 40 percent of the original cost of those facilities has already been taken as

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488 Id. at 8.

489 Id.

490 Id.

491 NAB Petition at 7.

492 CCTA Comments at 14.

493 Id. at 15.

depreciation expense.[494] We believe that our existing practices are adequate to respond to any acceleration in the rate of technological change in the provision of loop facilities.[495] We also note that to date we have received more than thirty video dialtone applications proposing use of advanced broadband networks. These applications provide evidence that the measures we have taken in this proceeding to eliminate artificial regulatory constraints will by themselves promote investment in broadband networks and that special incentives are unnecessary.

D. RECOMMENDATION TO CONGRESS

Background

261. In the Second Report and Order, the Commission recommended that Congress amend the 1984 Cable Act to permit LECs, subject to appropriate safeguards, to provide video programming directly to subscribers in their telephone service areas. The Commission stated that if Congress repealed the ban, the Commission would require LECs to provide video programming services through a separate subsidiary, if it concluded that the benefits of structural separation exceeded the costs. In addition, the Commission stated that it would require LECs to provide video programming services through the basic video dialtone platform that provides service to multiple programmers. Finally, the Commission stated that it anticipated limiting LEC-provided video programming initially to a specified percentage of overall capacity. The Commission did not specify an exact capacity limitation, but noted that Congress was then considering a bill that would limit a LEC to 25% of the platform's capacity for carrying affiliated video programming and suggested that this might represent a "reasonable balance."[496]

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494 This average remaining life is based upon staff analysis of the theoretical depreciation study findings specified by the Commission. See generally The Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, as amended, for BellSouth Telecommunications, Inc., et al., 9 FCC Rcd 734 (1994).

495 Moreover, we note that the Commission has adopted simplified depreciation prescription processes for price cap LECs which afford those LECs a greater degree of flexibility in the depreciation prescription process. Simplification of the Depreciation Prescription Process, Second Report and Order, FCC 94-174 (released June 28, 1994); Report and Order, 8 FCC Rcd 8025 (1993). See also Simplification of the Depreciation Prescription Process, Further Order Inviting Comments, FCC 94-256 (released October 11, 1994).

496 7 FCC Rcd at 5850, paras. 143 n.360.

Pleadings

262. A few telephone companies, NAB, and OC/UCC seek reconsideration of some or all aspects of the Commission's recommendation to Congress. Ameritech and USTA object to the Commission's predisposition towards structural separation requirements for LEC-provided video programming. Ameritech argues that this presumption is at odds with the Commission's finding that the separate subsidiary requirement is no longer necessary to protect against LEC abuses in the area of enhanced services.[497] It asserts that the Commission has shown no reason why this conclusion should not apply equally to video programming as other enhanced services. USTA maintains that a separate subsidiary requirement could require construction of redundant networks -- one for video dialtone, and the other for provision of video programming directly to subscribers.[498]

263. SWBT objects to all of the proposed safeguards.[499] It asserts that limiting the amount of LEC-provided programming over video dialtone platforms violates LEC First Amendment rights and discourages LEC investment in video dialtone by increasing the potential that those facilities may never be efficiently utilized. It also argues that the proposed restrictions would be unfair, insofar as they apply only to LECs, and not to cable companies.

264. OC/UCC and NAB criticize the Commission's recommendation that the ban on LEC provision of video programming be removed.[500] OC/UCC contends that this recommendation cannot be reconciled with the Commission's stated concern for promoting diversity and competition in the provision of video services.[501] NAB maintains that, without the video programming prohibition, LECs would be able to purchase cable systems within their telephone service areas, and thereby substitute one monopoly for another.

Discussion

265. Although petitions for reconsideration do not lie against reports to Congress,[502] we nevertheless take this opportunity

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497 Ameritech Petition at 16.

498 USTA Comments at 16-17.

499 SWBT Petition at 13-16.

500 See OC/UCC Petition at 2-4; NAB Petition at 9-10.

501 OC/UCC Petition at 1-2.

502 See 47 U.S.C. § 405.

to affirm our recommendation that Congress amend the 1984 Cable Act to permit LECs to provide video programming directly to subscribers in their telephone service areas, subject to appropriate safeguards. As we noted in the Second Report and Order, the 1984 Cable Act's ban on LEC provision of video programming was originally enacted to prevent LECs from establishing a monopoly position in the provision of video services.[503] Given the enormous growth of the cable industry during the past decade, the risk of telephone companies preemptively eliminating competition in the video marketplace has lessened significantly. While there remains some risk of anticompetitive behavior by the LECs, we affirm our finding that this risk can and should instead be addressed through our video dialtone framework and other appropriate regulatory safeguards. Thus, contrary to OC/UCC's contention, our recommendation that the prohibition be lifted is not inconsistent with our concerns about LEC discrimination. Moreover, NAB's assertion that a lifting of the ban would contravene the public interest by enabling LECs to purchase cable companies in their service areas instead of deploying video dialtone assumes that regulatory safeguards would not address this issue.

266. We do not now address LEC arguments regarding the need for particular safeguards. We will address those arguments in the context of individual Section 214 applications or in any further rulemaking proceeding we may initiate to address the LEC provision of video programming directly to subscribers.

267. Just as we believe that the removal of barriers to full and fair competition in the video services market would serve the public interest, we also favor full and fair competition in the provision of telephony. We recognize that both the House of Representatives and a Committee of the Senate gave overwhelming approval to legislative proposals that included removal of barriers to local exchange competition as part of a comprehensive and balanced package of proposals. We share those legislators' goal of expanding competition in communications markets. Indeed, video dialtone is an important part in our efforts to accomplish this goal. We encourage Congress to remove barriers to the competitive provision of local telephone services to further this goal.

V. THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

A. Capacity Issues

268. One of the key elements of the Commission's video dialtone policy is the requirement that LECs seeking to offer video dialtone service provide a common carrier platform containing sufficient capacity to serve multiple video programmers, and that

503 7 FCC Rcd at 5848, para. 136.